From: Kerner
To: Microsoft ATR
Date: 1/23/02 11:23am
Subject: Microsoft Settlement

To: Renata B. Hesse
Antitrust Division
U.S. Department of Justice
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Under the Tunney Act, I would like to comment on the proposed Microsoft
settlement. There are several faults with the proposed Microsoft
settlement. I will list these faults as well as a brief discusson of why
the fault is important to me as an independent software developer (I speak
here both for myself, my company, and my staff).

1. The settlement requires Microsoft to publish its secret APIs, but it
does not provide a definition of API that Microsoft must disclose all APIs.

As a software developer we use the APIs on our target operating systems to
make our software compatible. Our software runs on Windows, Linux, and Mac
OS. The performance of our software on Windows is severely limited because
of limited access to certain APIs. These secret APIs allow competing
Microsoft software to outperform our offering on their platform.

2. The settlement requires Microsoft to publish information, but allows
Microsoft to determine to whom it distributes that information.

Microsoft is given the ability to only publish information to viable
companies as defined by Microsoft. Previous Microsoft activities would
show they will limit the definition of a viable company as much as
possible. My company, which provides Internet education tools, has a
limited, but profitable, operating history. Because of our limited history
we would most likely be excluded from any Microsoft defined list of viable
companies.

3. The settlement applies to Windows, but it defines Windows in such a way
that Windows XP, Windows CE, Pocket PC, and the X-Box (all of which use the
Win32 API and are advertized as being "Windows Powered") are not included.

It is important that Microsoft is not able to continue their monopolistic
abuses on other platforms. Under the proposed settlement all Microsoft
must do is migrate users to a new platform. This new platform does not
represent a substantial change from the previous Windows platforms except
that they are not included in the settlement.

4. The settlement fails to prohibit anticompetitive license terms

currently used by Microsoft.

Many Microsoft tools are provided to developers in such a way that restricts use of those tools with Open Source Software. Our products rely on Open Source middleware. In order to provide a good user experience on Windows certain Microsoft tools are required. Microsoft's licensing structure for those tools prohibits us from distributing them solely because of our association with Open Source Software.

The core platform for our application is Linux. Microsoft's enterprise license agreements (which are used by large companies, state governments, and universities) charge by the number of computers that could run a Microsoft operating system, not by the number of computers actually running a Microsoft operating system. This means that our larger clients must pay a Microsoft license on a computer running the Linux operating system for our software. This type of license was banned for OEMs by the 1994 consent decree, however it remains in place for Microsoft enterprise licensing.

5. The settlement as written appears to lack any type of enforcement mechanism.

The settlement calls for the creation of a Technical Committee, yet this committee seems to have no real power over Microsoft activities. The core enforcement of the settlement is left to the judicial system. As Microsoft has proven in the past (the 1994 consent decree), they are unwilling to behave in a manner that does not abuse their monopoly position. The current enforcement mechanism allows Microsoft to behave as it sees fit until further judicial intervention is taken.

While this list of shortcomings in the proposed Microsoft settlement is in no way complete, it does clearly illustrate areas where the settlement is not in the public interest. The settlement continues to allow Microsoft to define the terms under which it operates, terms that will allow it to continually abuse its monopoly status.

We cannot allow a confirmed, abusive monopolist to dictate its own terms for this settlement. These practices will not be resolved by the proposed settlement and as such leave software vendors, OEMs, and our customers to fend for ourselves against Microsoft. The proposed settlement allows Microsoft to receive a slap on the wrist as the judicial system looks the other way.

Sincerely,
Matthew Kerner
President, Educara Software Corporation

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